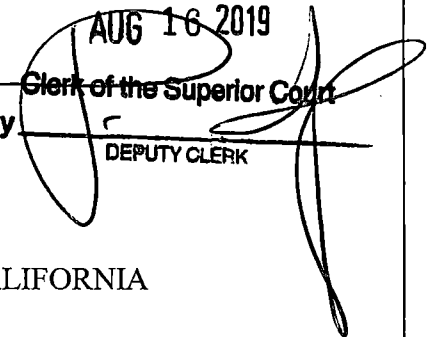


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FILED
SAN MATEO COUNTY

AUG 16 2019
Clerk of the Superior Court
By 
DEPUTY CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN MATEO

SIX4THREE, LLC,

Plaintiff,

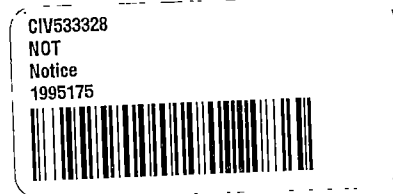
v.

FACEBOOK, INC., et al.,

Defendants.

CASE NO: CIV533328

VERIFIED ANSWER OF
JUDGE V. RAYMOND SWOPE
TO STATEMENT OF DISQUALIFICATION;
MEMORANDUM OF POINTS AND
AUTHORITIES



The Honorable V. Raymond Swope, Judge of the Superior Court of California, County of San Mateo, hereby responds to the statement of disqualification filed by plaintiff in the instant matter.

VERIFIED ANSWER OF JUDGE V. RAYMOND SWOPE

I, V. Raymond Swope, do declare as follows:

1. I am a Judge of the Superior Court of California, County of San Mateo, and have been assigned to preside over this case. If called upon as a witness, I could and would competently testify to the matters as stated herein.

2. On October 25, 2016, the court signed a stipulated protective order in this case. On November 1, 2018, the court granted a motion to seal certain confidential documents, and further ordered stricken certain evidence proffered by plaintiff in its filing. Then, on November 19, 2018,

1 the court was notified by defendant Facebook, Inc., that un-redacted copies of documents were
2 released in violation of the court's prior protective order. On November 20, 2018, the court issued a
3 further order that no un-redacted copy of plaintiff's opposition to either Facebook's special motion
4 to strike or individual defendants' special motion to strike could be transmitted, released or
5 submitted until further order of the court. Finally, the court stated that a failure to comply with the
6 court's order would be considered an act of contempt.

7 3. Thereafter, on November 26, 2018, defendant Facebook, Inc. filed an ex parte
8 application for an order to show cause regarding plaintiff's contempt of the court's orders. Since
9 the date of that ex parte filing, there have been numerous pleadings and declarations filed by both
10 plaintiff and defendant regarding their respective positions. In addition, there have been numerous
11 hearings concerning the order to show cause at which the court issued further orders directed to the
12 parties.

13 4. On July 2, 2019, Matthew J. Olson and the law firm of Macdonald/Fernandez filed
14 a notice of limited scope representation of plaintiff, after plaintiff's prior counsel withdrew.
15 Plaintiff then filed its first statement of disqualification on July 12, 2019. That challenge was
16 based on the fact that I had previously denied as untimely plaintiff's Code of Civil Procedure
17 section 170.6 challenge. The first statement of disqualification was stricken for failure to state
18 grounds on its face.

19 5. Plaintiff has now filed plaintiff's second statement of disqualification. In this
20 second statement of disqualification, plaintiff contends that I am biased and/or that there is an
21 appearance of bias. In addition, plaintiff contends that I have prejudged this case. This second
22 challenge is not verified. Rather the challenge is accompanied by the declaration of attorney
23 Matthew J. Olson, who bases his assertion of bias upon his "information and belief." Although
24 Mr. Olson and Macdonald/Fernandez were not counsel for plaintiff prior to the time they filed
25 the notice of limited scope representation, counsel has attached as exhibits to his declaration
26 reporter's transcripts from hearings held in this case on November 30, 2018, December 7, 2018,
27 December 17, 2018, March 13, 2019, March 15, 2019, May 10, 2019 and July 19, 2019. In
28 addition, plaintiff includes the court's order to show cause dated September 28, 2018, and the

1 court's orders of April 29, 2019, June 19, 2019 and August 1, 2019. Plaintiff further includes
2 various pleadings and news articles regarding the case. Although not stated in the declaration, in
3 the memorandum of points and authorities, plaintiff alleges that the court's statements and orders
4 issued during the proceedings indicate a bias and prejudgment of the issues.

5 6. I deny the claims made by plaintiff in this second statement of disqualification
6 that I am biased or that any grounds for disqualification exist. I am not biased or prejudiced
7 against or in favor of plaintiff Six4Three, LLC. I am not biased or prejudiced against or in favor
8 of plaintiff's counsel. I am not biased or prejudiced against or in favor of defendant Facebook,
9 Inc. I am not biased or prejudiced against or in favor of any party or attorney in this proceeding.
10 I know of no reason why I cannot be fair and impartial in this case.

11 7. I deny the claims made by plaintiff that any of my statements, decisions or orders
12 rendered during the proceedings have been the product of bias or have in any way indicated a
13 pre-judgment of this case. My statements and rulings are set forth in the records and in the files
14 therein, which are the best evidence thereof. To the extent the moving party's statement of those
15 rulings are inconsistent therewith, they are denied.

16 8. All statements made by me and all actions taken by me in this proceeding, and in
17 every proceeding over which I have presided, have been done in furtherance of what I believe
18 were my judicial duties. My decisions have been based entirely upon the facts and information
19 officially provided to me and my experience in handling similar cases.

20 9. All rulings made by me in this action have been based upon the facts and
21 arguments officially presented to me and upon my understanding of the law. I am not
22 predisposed to rule in any particular manner in the instant case

23 10. There are no facts or circumstances that I know of which would require my
24 disqualification or recusal in this case.

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1 statements and rulings made during the proceedings about the proceedings do not constitute a
2 valid basis for the disqualification of the court.

3 **II.**

4 **THE SECOND STATEMENT OF DISQUALIFICATION IS UNTIMELY**

5 “The statement shall be presented at the earliest practicable opportunity after discovery of
6 the facts constituting the ground for disqualification.” (Code Civ. Proc., § 170.3, subd. (c)(1);
7 *People v. Sweet* (1937) 19 Cal.App.2d 392; *Krebs v. Los Angeles R. Corp.* (1936) 7 Cal.2d 549.)

8 “A party seeking to disqualify a trial judge for cause must file a statement of disqualification at
9 the ‘earliest practical opportunity’ after discovering facts constituting the grounds for the
10 disqualification.” (*Eckert v. Superior Court* (1999) 69 Cal.App.4th 262, 265.)

11 The court in *Tri Counties Bank v. Superior Court* (2008) 167 Cal.App.4th 1332, 1337,
12 stated: “The strict promptness requirement is not to be taken lightly, as a failure to comply
13 constitutes forfeiture or an implied waiver of the disqualification. (Citation.)”

14 Here, the challenge is untimely. Plaintiff complains about the court’s statements and
15 rulings at hearings on November 30, 2018, December 7, 2018, December 17, 2018, March 13,
16 2019, March 15, 2019 and May 10, 2019; well before plaintiff filed the present challenge on
17 August 6, 2019. Plaintiff’s delay in bringing the present challenge constitutes an implied waiver
18 of the disqualification. Accordingly, the present challenge must be denied.

19 **III.**

20 **THE STATEMENT OF DISQUALIFICATION DOES NOT SET FORTH FACTS**
21 **WHICH CONSTITUTE GROUNDS FOR DISQUALIFICATION**

22 Code of Civil Procedure section 170.3(c)(1) requires the disqualification statement set
23 forth “the facts constituting the grounds” for the disqualification of the judge. Mere allegations
24 setting forth the conclusions of the declarant do not comply. (*Ephraim v. Superior Court* (1941)
25 42 Cal.App.2d 578, 578-579; *Urias v. Harris Farms, Inc.* (1991) 234 Cal.App.3d 415, 426.)

26 Plaintiff, as the party seeking the disqualification of the court, has the burden of
27 demonstrating that Judge Swope is biased or prejudiced; and, in the absence of proof, the
28 presumption is that no bias or prejudice exists. (*Betz v. Pankow* (1993) 16 Cal.App.4th 919, 926;

1 *see also, Estate of Buchman* (1955) 132 Cal.App.2d 81, 104.) Indeed, a party's belief as to a
2 judge's bias and prejudice is irrelevant and not controlling in a motion to disqualify for cause, as
3 the test applied is an objective one. (*United Farm Workers of America v. Superior Court* (1985)
4 170 Cal.App.3d 97, 104; *Stanford University v. Superior Court* (1985) 173 Cal.App.3d 403, 408
5 ("[T]he litigants' necessarily partisan views do not provide the applicable frame of reference."))
6 "Potential bias and prejudice must clearly be established. (Citation.)" (*Roitz v. Coldwell Banker*
7 *Residential Brokerage Co.* (1998) 62 Cal.App.4th 716, 724.)

8 Here, plaintiff has not clearly established that the court is biased or has prejudged any
9 issue. Code of Civil Procedure section 170.3(c)(1) states that "any party may file with the clerk
10 a written verified statement objecting to the hearing or trial before the judge and setting forth the
11 facts constituting the grounds for disqualification of the judge." Although section 170.3(c)(1)
12 requires a verified challenge, a party may support the challenge with a declaration, if the
13 declaration is executed under penalty of perjury and clearly sets forth the basis for the challenge.
14 (*Hollingsworth v. Superior Court* (1987) 191 Cal.App.3d 22, 25–26.) In this case, the challenge
15 is not verified or supported by a declaration which clearly sets forth the factual basis for the
16 challenge. Further, plaintiff counsel's declaration is based upon his "information and belief."
17 However, the declaration or verified statement filed in support of the disqualification is held to
18 the same standard of admissibility as is oral testimony. (*Mayo v. Beber* (1960) 177 Cal.App.2d
19 544, 551.) "[B]ias and prejudice are never implied and must be established by clear averments."
20 (*Woolley v. Superior Court* (1937) 19 Cal.App.2d 611, 626.) Verified statements which are
21 based upon hearsay or upon information and belief, such as in this case, are not sufficient to
22 support a judicial disqualification. (*United Farm Workers of America, AFL-CIO v. Superior*
23 *Court* (1985) 170 Cal.App.3d 97, 106, n. 6; *Higgins v. City of San Diego* (1899) 126 Cal. 303,
24 313-314.)

25 Here, instead of supporting the statement of disqualification with a verification or
26 declaration setting forth the factual basis for the present challenge, plaintiff has submitted
27 numerous hearing transcripts, court orders and newspaper articles. Like in this case, in *In re*
28 *Morelli* (1970) 11 Cal. App. 3d 819, 843–44, the court held that the statement of disqualification

1 may be stricken where it is based upon "conclusions; references to copious transcripts without
2 citation to specific excerpts; allegations of facts not pertinent or appropriate to the issues to be
3 determined in the hearing; material not legally indicative of bias or prejudice, such as judicial
4 opinions expressed in the discharge of litigation and legal rulings; judicial reactions based on
5 actual observance in participation in legal proceedings; and references to circumstances so
6 inconsequential as to be no indication whatsoever of hostility and nonprobative of any bias or
7 prejudice. (Citations.)"

8 Indeed, "[t]o show bias or prejudice...there must be declarations showing indications of
9 personal bias or the existence of some fixed anticipatory prejudgment." (*In re the Marriage of*
10 *Fenton* (1982) 134 Cal.App.3d 451, 457.)

11 Here, there are no facts set forth to show a personal bias against a party or party's
12 attorney. There are no facts set forth to show a fixed anticipatory prejudgment.

13 Bias or prejudice consists of a "mental attitude or disposition of the judge towards
14 a party to the litigation . . ." (Citation.) In order for the judge to be disqualified,
15 the prejudice must be against a particular party ... and sufficient to impair the
16 judge's impartiality so that it appears probable that a fair trial cannot be held.
(Citations.)

17 (*Ensher, Alexander & Barsoom, Inc. v. Ensher* (1964) 225 Cal.App.2d 318, 322-323.)

18 As stated in *People v. Ford* (1914) 25 Cal.App. 388, 395:

19 It is not sufficient in a case of this kind, to allege in the affidavit simply that the
20 defendant believes that he cannot have a fair and impartial trial, etc., but it must
21 be made to appear by the affidavit or affidavits on file that a fair and impartial
22 trial cannot be had before the judge about to try the case, by reason of the bias and
23 prejudice of such judge. (Citation.) The affidavit or affidavits must not only state
24 facts, but the facts stated must establish to the satisfaction of a reasonable mind
25 that the judge has a bias or prejudice that will in all probability prevent him from
26 dealing fairly with the defendant.

27 As is clear from the reporter's transcripts attached to the declaration of plaintiff's
28 counsel, no reasonable person would fairly entertain a doubt that Judge Swope would be fair and
impartial in this case. The test for such a determination is an objective one: "whether a
reasonable member of the public at large, aware of all the facts, would fairly entertain doubts
concerning the judge's impartiality." (*Briggs v. Superior Court* (2001) 87 Cal.App.4th 312, 319.)

1 The 'reasonable person' is not someone who is 'hypersensitive or unduly
2 suspicious,' but rather is a 'well-informed, thoughtful observer.' (Citation.)
3 '[T]he partisan litigant emotionally involved in the controversy underlying the
4 lawsuit is not the *disinterested objective observer* whose doubts concerning the
5 judge's impartiality provide the governing standard.' (Citations.)

6 (*Wechsler v. Superior Court* (2014) 224 Cal. App. 4th 384, 391.)

7 Moreover, the statements and rulings of the court made during the proceedings do not
8 support grounds for disqualification. Code of Civil Procedure section 170.2(b) states that it is
9 not grounds for disqualification that a judge "has in any capacity expressed a view on a legal or
10 factual issue presented in the proceeding." In fact, rulings and findings based upon evidence and
11 argument officially presented can almost never constitute a valid basis for disqualification.

12 As stated in *Liteky v. United States*, *supra*, 510 U.S. 540, 555:

13 [O]pinions formed by the judge on the basis of facts introduced or events
14 occurring in the course of the current proceedings, or of prior proceedings, do not
15 constitute a basis for a bias or partiality motion unless they display a deep-seated
16 favoritism or antagonism that would make fair judgment impossible.

17 As stated in *McEwen v. Occidental Life Ins. Co.* (1916) 172 Cal. 6, findings based upon
18 evidence and argument officially presented can almost never constitute a valid basis for
19 disqualification. Erroneous rulings, even when numerous and continuous, are not grounds for
20 bias or prejudice, nor are "judges' expressions of opinion uttered in what he conceives to be the
21 discharge of his judicial duty." (*Ibid.*) A party's remedy for an erroneous ruling is not a motion
22 to disqualify, but rather review by appeal or writ. (*Id.* at 11; *see also*, *Ryan v. Welte* (1948) 87
23 Cal.App.2d 888, 893 ("[A] wrong opinion on the law of a case does not disqualify a judge, nor is
24 it evidence of bias or prejudice.")) Otherwise, "no judge who is reversed by a higher court on
25 any ruling or decision would ever be qualified to proceed further in the particular case." (*Ibid.*)
26 The proper remedy is an appeal from the erroneous ruling. (*Ibid.*)

27 As stated in *Liteky*, 510 U.S. at 555:

28 [J]udicial rulings alone almost never constitute valid basis for a bias or partiality
motion. (Citation.) In and of themselves ... they cannot possibly show reliance
upon an extrajudicial source; and can only in the rarest circumstances evidence
the degree of favoritism or antagonism required ... when no extrajudicial source

1 is involved. Almost invariably, they are proper grounds for appeal, not for
2 recusal.

3 The statements and rulings made by the court in the instant matter are insufficient to
4 support a claim of bias or impartiality. If plaintiff believes the court's decisions and rulings have
5 been erroneous, plaintiff's remedy is not to file a disqualification motion but rather to file an
6 appeal or writ petition.

7 Code of Civil Procedure section 170 states that it is the duty of judicial officers to hear
8 matters assigned to them. Indeed, the Court of Appeal has stated that it is the court's *obligation*
9 not to recuse itself where there are no grounds for disqualification.

10 Judicial responsibility does not require shrinking every time an advocate asserts
11 the objective and fair judge appears to be biased. The duty of a judge to sit where
12 not disqualified is equally as strong as the duty not to sit when disqualified.
(Citation.)

13 (*Briggs v. Superior Court* (2001) 87 Cal.App.4th 312, 319.)

14 Judge Swope has a duty to preside over this case because he is not biased or prejudiced
15 against or in favor of any party or party's attorney, he has not prejudged the case, and no
16 reasonable person knowing all of the facts would believe that Judge Swope would not be fair and
17 impartial in this case.

18 **IV.**

19 **CONCLUSION**

20 Plaintiff has failed to meet its burden of demonstrating facts constituting grounds for
21 disqualification of the court. Moreover, the present challenge is untimely. Thus, for all of these
22 reasons, plaintiff's statement of disqualification must be denied and Judge Swope must continue to
23 hear the instant matter.

24 Dated: August 16, 2019

CUMMINGS, MCCLOREY, DAVIS, ACHO & ASSOCIATES, P.C.

25
26 By:



27 Sarah L. Overton
28 Attorneys for the Honorable V. Raymond Swope,
Judge of the Superior Court of California, County of San Mateo